FILED
MAY 13 1994
OFFICE OF THE CLERK

No. 93-1624

In The

Supreme Court of the United States

October Term, 1993

JANE ALICE PSARIANOS, ET AL.,

Petitioners,

v.

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA), LTD.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.

Did the Fifth Circuit Court of Appeals correctly rule that petitioners, as judgment creditors of a shipowner, (1) had no direct right of action against the shipowner's protection and indemnity insurer to satisfy their judgment, and (2) as strangers to the insurance contract, had no standing to assert extracontractual claims against the insurer?

2.

Did the Fifth Circuit Court of Appeals correctly rule that petitioners had no standing to contest an arbitration award regarding a marine insurance contract to which petitioners were not parties and in which petitioners had no rights?

LIST OF PARTIES

Respondent:

The United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd.

Petitioners:

Jane Psarianos
Sale & Fatme Impraim
Aise Impraim
Irini Psarianos
Christos Bambas
Chryssoula Bessis
Lambros Matsoukas
Dimitrios Kypriotis
Vasilious Vlahos
Elias Markotinis
Loukia Mylonakis
Theodora Sarlanis
Angeliki Latsoudis
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Evangelos Polymeros
Dimitrios Tsergoulas

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS THE WRIT SHOULD BE DENIED 9

1. The Lower Courts' Decisions Are Correct And Based On Settled Legal Principles – There Are No Important, Unsettled Questions Of Federal Law 9

2. Judgment Creditors Of A Shipowner, Having No Property Rights In An Indemnity Insurance Contract, Have No Right Of Action Against The Insurer On The Contract Or To Assert Extra-contractual Claims Under State Law 11

3. Petitioners Have No Standing To Contest An Arbitration Award Concerning A Contract To Which They Are Not Parties 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Ahmed v. American Steamship Owners Mutual Protection & Indemnity Ass'n, 640 F.2d 993 (9th Cir. 1981) 11

Allstate Ins. Co. v. Watson, 37 Tex.Sup.Ct. J. 408 (Jan. 12, 1994) 10, 13

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 12

Bowman v. Charter General Agency, Inc., 799 S.W.2d 377 (Tex.App. – Corpus Christi 1990, no writ) 13

Chaffin v. Transamerica Ins. Co., 731 S.W.2d 728 (Tex.App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.) 13

Continental Oil Co. v. Republic Ins. Co., 819 F.2d 120 (5th Cir. 1987) 11

Firma C-Trade S.A. v. Newcastle P. & I. Ass'n, Lloyd's Rep. (Vol.2) 191 (H.L. 1990) 7, 12

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 10

Stuyvesant Ins. Co. v. Nardelli, 286 F.2d 600 (5th Cir. 1961) 12

Travelers Indem. Co. v. Calvert Fire Ins. Co., 832 F.2d 850 (5th Cir. 1988) 13

Warfield v. Fidelity & Deposit Co., 904 F.2d 322 (5th Cir. 1990) 13

Weeks v. Beryl Shipping, Inc., 845 F.2d 304 (11th Cir. 1988) 11

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent, the United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd., files this brief in opposition to petitioners' petition for certiorari.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 12 F.3d 461 and is reproduced in petitioners' appendix, A1-A9.

The memorandum order of the United States District Court for the Eastern District of Texas, Beaumont Division confirming the arbitration award is reported at 790 F. Supp. 135 and is reproduced in petitioners' appendix (A10-A13), and the order confirming the award and dismissing the third-party claim is unreported and is reproduced in petitioners' appendix, A14-A15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners contend that the Due Process Clause of Amendment XIV, § 1 of the United States Constitution and the Rules of Decision Act, 28 U.S.C. § 1652, are involved.

STATEMENT OF THE CASE

Petitioners' arguments rest on an erroneous interpretation of the decisions of the Fifth Circuit Court of Appeals and the district court, and on an inaccurate, incomplete and misleading statement of the procedural history and the facts of this case.

Petitioners filed suit originally in the United States District Court for the Eastern District of Texas, Beaumont Division, for the deaths and injuries of members of the crew of the M/V THOMAS K, as a result of the sinking of the vessel on February 1, 1984. The vessel was owned by Eagle Transport, Ltd. ("Eagle") and its alleged alter ego, Peter T. Kikis. The vessel was entered with The United

Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd. (the "Association") for protection and indemnity insurance, according to the Rules of the Association.

Petitioners sued Eagle and others, including the American Bureau of Shipping ("ABS"). The Association declined to cover Eagle's potential liability to Petitioners, on the ground that certain of its Rules had been breached which voided the coverage. Eagle filed a third-party complaint against the Association for breach of the insurance contract. The Association moved to dismiss for lack of jurisdiction and, alternatively, moved to stay the third-party action and to compel arbitration of the insurance dispute according to the Association's Rules. The District Court severed the third-party action just prior to the trial of petitioners' claims against Eagle and ABS. In March, 1986 the injury and death claims were tried against Eagle and ABS, which resulted in judgments against both in favor of the petitioners. ABS subsequently settled. The judgment against Eagle remains unsatisfied. Neither Eagle nor Kikis have paid any part of that judgment. Contrary to the statement made by Petitioners in their Petition (p. 13), the Association has never conceded nor has there been any finding that Eagle or Kikis are insolvent.

The district court then dissolved its order of severance and reconsolidated the third-party action with the original suit. In a Memorandum Opinion, reported at 728 F. Supp. 438, the district court denied the Association's jurisdiction challenge, but granted the motion to stay and to compel arbitration. In the course of that decision the district court correctly determined that the contract of insurance between Eagle and the Association was one of

indemnity only: "Eagle is a member of the Club,[1] not simply an insured; and the coverage provided is indemnity, rather than liability." 728 F. Supp. at 451. The district court ordered Eagle and the Association to arbitrate in London the question of Eagle's entitlement to coverage, in accordance with the Association's Rules. The court stayed the remainder of the case pending arbitration.

In accordance with the district court's order for arbitration, Eagle and the Association each appointed London arbitrators. Those arbitrators chose an umpire. The Association relied on two principal reasons why Eagle was not entitled to recover for the underlying judgments in favor of the petitioners. First, Eagle had failed to comply with certain of the Rules, thus voiding all rights to indemnity. Second, the insurance contract was one of indemnity only, requiring Eagle to pay any judgment before being entitled to collect from the Association.

While the arbitration was pending, petitioners notified the Association that they intended to file suit in Texas state court directly against the Association in an attempt to collect their judgments against Eagle, as well as to assert liability on the Association for alleged bad faith and extracontractual damages under Texas law. Among other contentions, the proposed state court suit (Paragraph X, App. 29) alleged that the insurance contract was not one of indemnity, but rather was a liability

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[1] The term "Club," in marine insurance jargon, is an unofficial reference to mutual associations who provide "P and I," or protection and indemnity insurance, to vessel owners, who in turn are known as "Members."

policy entitling petitioners as judgment creditors to collect directly against the Association. Faced with the prospect of multiple lawsuits and arbitration seeking to adjudicate the same issues, with the possibility of inconsistent judgments, the Association sought injunctive relief in the district court, and also filed its cross-claim for declaratory judgment in the district court where petitioners' suit was originally filed and was still pending. In response to the Association's motion for an injunction to prevent petitioners from filing the threatened state court suit, petitioners stipulated in open court that they would not do so without notifying the court and counsel. Instead of filing the state court suit, Petitioners filed their own counter-claim against the Association for declaratory judgment on the coverage issues. In their Statement of the Case (p. 5), petitioners describe the Association's filing of the cross-claim for declaratory judgment as a "race to the courthouse." On the contrary, petitioners and the Association were already in the courthouse originally chosen by the petitioners.

In March, 1991 the London arbitrators fixed a hearing date for arbitration to commence on February 24, 1992. Eagle and petitioners complained to the federal district court that the arbitration was taking too long and was too costly. Eagle's Texas counsel, George Renaudin, wrote the district court that Eagle and Kikis would no longer participate in the arbitration. In response to these complaints, in July, 1991 the Association moved the arbitrators to rule on certain preliminary issues which, if favorable to the Association, would substantially shorten the arbitration process. In their Statement of the Case (p. 7), petitioners describe this shortened process as "suspicious", all the

while ignoring the fact that the process was shortened in response to Eagle's and petitioners' complaints about the length and cost of the arbitration.

The arbitrators agreed with the Association, and scheduled the arbitration hearing in London on November 7-8, 1991, before the three-man tribunal. Despite his Texas counsel's letter to the court that he would no longer participate in the arbitration, Mr. Kikis appeared at the arbitration *pro se*, having earlier parted ways with his London counsel. Mr. Kikis, a Princeton graduate and a principal in several international shipping concerns, stated he was thoroughly familiar with the arbitration process. He explained he preferred to represent himself because he was more knowledgeable of arbitration proceedings, and he could do a better job than the lawyers. The transcript of the arbitration proceedings, which lasted two days, was introduced into evidence in the district court. That transcript shows clearly that Mr. Kikis presented Eagle's position, submitted evidence, and cross-examined witnesses. He made no complaints about the conduct of the proceeding, did not ask for a continuance, and acknowledged at the conclusion of the hearings that he had been treated fairly.

On January 2, 1992 the arbitration panel issued a unanimous award ruling that Eagle had no right of recovery against the Association because, first, Eagle had breached a Rule that voided coverage, and second, the insurance contract was for indemnity only and Eagle had paid no part of the underlying judgment.

The Association moved the district court to confirm the arbitration award and to dismiss Eagle's third-party

complaint, which the court granted (App. 14). The Association also moved for summary judgment on the Association's cross-claim against the petitioners (as well as the petitioners' counterclaim against the Association), on the grounds that the petitioners had no standing to pursue a direct claim against the Association to collect the judgments which Eagle had never paid, and had no standing to assert bad faith or extracontractual claims under state law. The district court granted the summary judgment on both grounds. (App. 10).

Petitioners and Eagle appealed to the Fifth Circuit. Eagle filed no brief, however, and the Fifth Circuit dismissed Eagle's appeal. Petitioners argued that the district court should have declined to entertain the declaratory judgment action. The Fifth Circuit rejected that argument, ruling that the district court did not abuse its discretion because the plaintiffs originally chose that forum and later themselves filed a counter-claim for declaratory judgment, rather than filing their earlier threatened state action.

Petitioners also argued that under the laws of England and Texas they had the right to directly sue the Association to collect their judgments and to assert extracontractual damages. The Fifth Circuit ruled that petitioners' arguments concerning English law had been definitely rejected in *Firma C-Trade S.A. v. Newcastle P. & I. Ass'n,* Lloyd's Rep. (Vol.2) 191 (H.L. 1990), where the House of Lords ruled that until an insured pays a loss under an indemnity policy, neither the insured nor third parties have any right to payment under the policy. Turning to Texas state law, the Fifth Circuit cited several firmly rooted decisions holding that third party claimants

have no direct right of action, either to collect the proceeds of an indemnity policy or to assert extracontractual causes of action.

Petitioners' contention that the arbitration proceeding was a "de facto" default is a gross mischaracterization and based exclusively on an affidavit of George Renaudin, Eagle's Texas counsel (App. 39-43). Yet, Mr. Renaudin was not present at the hearings and had no personal knowledge of the proceedings. He had not even discussed it with Mr. Kikis. His affidavit is not credible for that reason and, more importantly, because it is in direct conflict with the transcript of the arbitration hearing.

Petitioners also misstate their role in the arbitration proceedings. In their petition they paint themselves as having had no knowledge of or participation in the arbitration proceedings and feign surprise when they learned an adverse award was rendered. The truth is that petitioners' counsel was well aware of the proceedings and, in fact, originally helped orchestrate Eagle's position in the arbitration. Eagle's London arbitration counsel considered the petitioners' counsel as their professional client, and was actually originally instructed by petitioners' counsel.

Petitioners misleadingly state (p. 6) that the arbitration award was rendered "[b]efore discovery was initiated" by them. The truth is that the district court had delayed consideration of the Association's original motion for summary judgment because petitioners asked for a delay to conduct discovery. But, petitioners never bothered to initiate any discovery.

Finally, Petitioners state (p. 8) that the district court refused to review the arbitration award. In fact, the district court did review the award in accordance with settled law, and found no infirmity in the award or any basis to refuse its enforcement.

Contrary to the representation made in petitioners' petition (pp. 10-13), the Fifth Circuit did not in a "roundabout" way rule that petitioners were bound by the arbitration award. Yet, it is on this erroneous representation that the petitioners' Due Process argument rests. The Fifth Circuit clearly held that petitioners had no standing to contest the arbitration award, because they had no rights in the indemnity insurance contract. For that reason, the Fifth Circuit did not address petitioners' objections to the arbitration award.

REASONS THE WRIT SHOULD BE DENIED

1. The Lower Courts' Decisions Are Correct And Based On Settled Legal Principles – There Are No Important, Unsettled Questions Of Federal Law

If everything petitioners say in their petition were true – and very little of what they say about the law or the facts is true – there would still be no reason to grant a writ of certiorari. As prescribed by Rule 10 of this Court, there are no "special and important reasons" for granting a writ. Specifically, the decision of the Fifth Circuit is clearly not in conflict with decisions of another court of appeals, nor does it decide a federal question in conflict with the Texas Supreme Court. The petition identifies no important, unsettled questions of federal law that should

consume this Court's time. Petitioners' petition is remarkable because it does not even make a pretense that there is such an issue in this case.

Petitioners are simply asking this Court to review alleged errors in the Fifth Circuit's decision and to correct those errors. Petitioners obviously misperceive this Court's role. As this Court has itself instructed on numerous occasions, its role is to take up unsettled legal issues that are "of importance to the public, as distinguished from that of the parties . . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). Rule 10 of the Supreme Court Rules embodies this standard for granting the writ of certiorari, and none of the legal principles discussed in the Fifth Circuit's opinion or in the petitioners' petition satisfy that criteria.

As discussed below, petitioners' Due Process arguments are predicated on the mistaken proposition that petitioners have a protected interest in the contract of indemnity insurance, but the cases on which petitioners rely all concern liability insurance, not indemnity insurance. Petitioners wholly fail to acknowledge this critical, basic distinction. Petitioners' arguments quickly collapse once that vital distinction is recognized. As for petitioners' claims for extracontractual causes of action under Texas law, petitioners plainly have no standing to make those claims, as the Texas Supreme Court held in a recent decision, *Allstate Ins. Co. v. Watson*, 37 Tex.Sup.Ct. J. 408 (Jan. 12, 1994). Petitioners not only ignore that decision, but fail to inform this Court that they made both contractual and extracontractual claims. Under both Texas law and English law petitioners simply have no property

interest in an indemnity policy and, for that reason alone, have no standing for their Due Process arguments.

2. Judgment Creditors Of A Shipowner, Having No Property Rights In An Indemnity Insurance Contract, Have No Right Of Action Against The Insurer On The Contract Or To Assert Extracontractual Claims Under State Law

Petitioners fashion their Due Process argument by, first, completely ignoring the indemnity nature of the insurance contract in this case and, second, wrongly assuming that they have rights as judgment creditors to proceed directly against an indemnity insurer on both their contractual and extracontractual claims.

The insurance contract is one of indemnity only. The district court so ruled in the course of ordering arbitration. The arbitrators also correctly recognized the indemnity nature of the contract. Petitioners, on the other hand, turn a blind eye to that vital distinction. The cases cited by petitioners (p. 9) all concern liability policies, which contain provisions allowing judgment creditors to collect directly under the liability policies. Indemnity policies have no such provisions. On the contrary, indemnity policies, such as the present insurance contract, specifically state that the insured must pay to be paid. The courts have consistently held that under such policies no one, including the insured, has a right of recovery until a loss has actually been paid by the insured. *Continental Oil Co. v. Republic Ins. Co.*, 819 F.2d 120 (5th Cir. 1987); *Weeks v. Beryl Shipping, Inc.*, 845 F.2d 304 (11th Cir. 1988); *Ahmed v. American Steamship Owners Mutual Protection & Indemnity*

Ass'n, 640 F.2d 993 (9th Cir. 1981); *Stuyvesant Ins. Co. v. Nardelli*, 286 F.2d 600 (5th Cir. 1961). Notwithstanding the Rules breach, since Eagle never paid any part of the underlying judgments, Eagle had no claim to funds from the Association, nor did the judgment creditors have any claim. This is also true under English law, *Firma C-Trade S.A. v. Newcastle Protection & Indemnity Ass'n*, Lloyd's Rep. (Vol. 2) 191 (H.L. 1990). In the lower courts the petitioners vigorously argued that English law applied, but now appear to have abandoned that contention.

Without establishing a property interest that is subject to Due Process guarantees, petitioners' Due Process arguments crumble. These salient rules have long existed:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

Petitioners cannot, and do not, point to any decision under state law that gives them any property right in an

indemnity insurance contract, because the law is settled that no such right exists.

Similarly, petitioners can point to no state law that gives them standing to make extracontractual claims. The law is to the contrary. In *Allstate Ins. Co. v. Watson*, 37 Tex.Sup.Ct.J. 408 (Jan. 12, 1994), the Texas Supreme Court ruled without equivocation that third parties to an insurance contract including liability policies, have no standing to assert extracontractual claims. This ruling solidified both the lower Texas appellate courts' and the Fifth Circuit's rejection of bad faith claims by injured third parties. *Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322 (5th Cir. 1990) (under Texas law); *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 832 F.2d 850 (5th Cir. 1988) (under maritime law); *Bowman v. Charter General Agency, Inc.*, 799 S.W.2d 377 (Tex.App. – Corpus Christi 1990, no writ); *Chaffin v. Transamerica Ins. Co.*, 731 S.W.2d 728 (Tex.App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.).

In sum, petitioners' Due Process arguments must fail because they assume incorrectly that they have protected property rights in an indemnity insurance contract, and they plainly do not.

3. Petitioners Have No Standing To Contest An Arbitration Award Concerning A Contract To Which They Are Not Parties.

Desperate to attack the arbitration award, petitioners inaccurately state that the Fifth Circuit in a "roundabout" way held that petitioners are bound by the arbitration award and, therefore, petitioners must have a

right to attack the award, which they describe as the product of a "de facto" default proceeding.

The Fifth Circuit did not rule, in a direct way or in a "round-about" way, that petitioners were bound by the arbitration award. Quite to the contrary, the Fifth Circuit ruled very plainly that petitioners possessed no rights in the insurance contract and, consequently, had no standing to attack the arbitration award. Eagle, which did have a right to attack the award, and was unsuccessful in its attack before the district court, filed no appellate brief. Eagle's appeal was therefore dismissed. And, Eagle has not sought review in this Court.

Moreover, describing the arbitration award as a "de facto" default proceeding is simply wrong. Such a mischaracterization is based solely on an argumentative affidavit submitted by attorney George Renaudin, who was not at the hearings and had no personal knowledge or even hearsay knowledge of what transpired. That is obvious when one compares the statements made in that affidavit with the facts contained in the actual transcript of the proceedings. The affidavit had no merit and was duly rejected by both the district court and the Fifth Circuit.

CONCLUSION

There is no reason to grant a writ of certiorari in this case. The decision of the Fifth Circuit is in accordance with settled legal principles and is in conflict with no other case. The writ should be denied.

Respectfully submitted,

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